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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TIMOTHY NELSON MCCULLOCH,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent,

Petition For Writ Of Certiorari To The Texas Court Of Appeals, Twelfth Judicial District

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED FOR REVIEW

Whether the Double Jeopardy provision of the Fifth Amendment to the United States constitution, as applied to the States by the Due Process Clause of the Fourteenth Amendment, prohibits Petitioner's retrial because of prosecutorial misconduct.

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v.

THE STATE OF TEXAS,
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Petition For Writ Of Certiorari To The Texas Court Of Appeals, Twelfth Judicial District

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Timothy Nelson McCulloch, petitions the Court for a Writ of Certiorari to review the judgment of the Texas Court of Appeals, Twelfth Judicial District, located in Tyler, Texas.

OPINION BELOW

The opinion of the Texas Court of Appeals, Twelfth Judicial District, dated January 31, 1995, is not yet reported. It is reprinted in the Appendix to this Petition.

JURISDICTION

On June 7, 1995, the Texas Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review seeking review of the decision of the Court of Appeals for the Twelfth Judicial District. On June 19, 1995, the Texas Court of Criminal Appeals refused rehearing on

McCulloch's Petition for Discretionary Review. This Petition for Writ of Certiorari is filed within ninety days of that date and is thus timely. S.Ct. Rules 13.1 and 13.4. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Course of Proceedings

Petitioner, Timothy Nelson McCulloch, was convicted of the offense of murder in the 349th Judicial District Court of Houston County, Texas in cause number 13,796cr. Punishment was assessed by the jury at 50 years in prison and an affirmative finding of use of a deadly weapon was entered.

On July 8, 1991, McCulloch timely filed his Motion for New Trial, and on or about August 6, 1991, McCulloch filed a First Amended Motion for New Trial. On September 12, 1991, the Trial Court conducted a hearing on McCulloch's Motion for New Trial. On September 16, 1991, the Trial Court granted McCulloch's Motion for New Trial. The State, on September 20, 1991, filed its Notice of Appeal, appealing the order granting the new trial. On

November 24, 1992, the Twelfth Court of Appeals affirmed the decision of the Trial Court granting the New Trial.

The instant appeal is from the denial of a writ of habeas corpus in the 2nd District Court, Cherokee County, Texas, the Honorable Bascom W. Bentley, III, presiding, Cause No. 12269. Although the State had originally instituted proceedings against McCulloch for the offense of murder in the 349th Judicial District Court of Houston County, Texas, a change of venue was ordered for the new trial, and the case was assigned to Judge Bentley in the 2nd District Court of Cherokee County. McCulloch filed a Writ of Habeas Corpus before Judge Bentley. On May 10, 1994, a hearing was held on the writ. That same day, the Court issued an order denying relief on the writ. (Tr. II 148).

On May 16, 1994, McCulloch timely filed his Written Notice of Appeal to the Court of Appeals, Twelfth Judicial District, appealing the denial of the Writ of Habeas Corpus. (Tr. II-149). The Court of Appeals, Twelfth Judicial District, issued an opinion affirming the trial court's decision on January 31, 1995. McCulloch filed a Motion for Rehearing, which was overruled on February 28, 1995. Thereafter, on May 4, 1995, the Texas Court of Criminal Appeals received and filed McCulloch's Petition for Discretionary Review. On June 7, 1995, the Texas Court of Criminal Appeals refused McCulloch's Petition for Discretionary Review. McCulloch's Motion for Rehearing on the refusal of the Petition for Discretionary Review was denied on June 19, 1995.

Statement of Facts

The incident in this case allegedly occurred on February 9, 1991. (R II 92). The Decedent, Michael Roy Hampton, and the Petitioner, Timothy McCulloch, along with some other

people, had gone to McCulloch's home after attending what was called the "Lovefest", in Lovelady, Texas. The deceased, Hampton, had been drinking that evening, as had McCulloch and the State's main witness, John Gerhart. (R II 94). Melissa Stewart, the witness who testified at the Motion for New Trial, had not been drinking. (R II 94). McCulloch told some of the girls who were present at his house to leave. (R II 96). McCulloch went outside with some of the people, and when he came back in, he had a gun in his hands. McCulloch asked what everyone was laughing about. (R II 96, 98). At this time, Hampton swatted at the gun, and the gun fired. (R II 98). Melissa Stewart testified that when John Gerhart realized Hampton had really been shot, (previously the boys had been faking being shot with blanks), McCulloch said "I didn't mean to do it. John, call 911." McCulloch then hung up the phone and got a washrag from the kitchen to help Hampton. (R II 98-99).

The next day, Deputy Sheriff Binky Monk found Melissa Stewart and told her to get down to the Sheriff's Department to give a statement. (R II 100). Stewart was in a room with Sheriff Walter Stanley and Deputy Binky Monk. (R II 101). She gave a written statement. That statement read as follows:

> Tim McCulloch fired a shot at Angela Blaire from the trailer house when she drove up. He also fired a shot at John Gerhart. The gun was loaded with blanks, or so Tim thought. Mike was sitting at the table in the kitchen when Tim shot Mike. He shot Mike after he had shot at John G. Tim was on the same side of the table as Mike when he shot him. I was standing between Tim and John Gerhart when Mike was shot. The first time he shot at John and Mike, the gun wasn't loaded. But

> the second time, the gun was loaded. Tim says after he fired at John Gerhart and Mike was laughing, "Do you think something is funny?" And pointed the gun at Mike and pulled the trigger. (R II 102).

Stewart testified, however, that this written statement was not prepared of her own volition. Stewart testified that Sheriff Stanley told her what to write and that, at the time, she was not aware that making a statement under those circumstances was wrong. (R II 103). Sheriff Stanley did not simply give Stewart some paper and permit her to write down her own version of the events. Instead, Stewart testified that before she was permitted to write her statement, Sheriff Stanley read to her statements of other people. (R II 103). Stewart then began to write her statement, and wrote as far as where it said "Tim was on the same side of the table as Mike when Tim shot him. I was standing between Tim and John Gerhart when Mike was shot the first time." At this time, Stewart testified that Sheriff Stanley threw the bullets that were supposedly shot on the table, and he said, "That's not what happened." (R II 103, 104). Stewart testified that Sheriff Stanley then told her what to write. (R II 103). Stewart gave no other written statements. The Trial Court determined that this statement, which was the one contained in the State's file, did not contain any exculpatory material.

Stewart also testified that she was called by Special Prosecutor Tuck Tucker to testify before the grand jury, but was asked only questions about events before the shooting. (R II 104-105). The prosecutor did not ask Stewart about the actual shooting. The State also subpoenaed Stewart to testify at trial. However, Stewart was not called as a witness by the State at the trial. (R II 107-108). Instead, Stewart, at the Motion for New Trial, testified that the day before trial

began, during jury selection, she had spoken with Tucker and his private investigator, Mr. R.C. Rich. During this conversation, Stewart had informed them that in her opinion, as an eyewitness to the shooting, the shooting was accidental, and also informed Mr. Tucker about the statements made by McCulloch immediately after the shooting. (R II 114).

The chief prosecutor in the case, Tuck Tucker, also testified at the hearing on the Motion for New Trial. Mr. Tucker admitted that a meeting with Melissa Stewart did occur on the day of jury selection. Although he stated that he did not recall Ms. Stewart's exact words, he did believe that Stewart told him she thought the shooting was accidental. (R II 130). However, Tucker also admitted that he simply did not consider her statements exculpatory because she had been under psychiatric care, her statement at the time of trial differed from her previous written statement, and based on Mr. Rich's investigation. (R II 130-131). Mr. Tucker also admitted that he did not tell defense counsel about Ms. Stewart's statement, and that if the statement was considered exculpatory, he would have been in violation of the Trial Court's Omnibus Order. (R II 129, 130). Later, however, during argument before the Trial Court on the Motion for New Trial, Mr. Tucker did admit that such a statement would be exculpatory. However, also during argument, Tucker changed his position from simply not recalling what Ms. Stewart's exact words were to, "I don't believe she made the statement." (R II 167).

In this case, the prosecution's theory throughout the trial was that the shooting was an intentional act done by McCulloch. During opening arguments at the trial, Mr. Tucker stated the State's theory that McCulloch intentionally pointed the gun at Hampton and intentionally shot him. Defense counsel put the State on notice during his opening statements of McCulloch's position that the shooting was

accidental, not intentional. McCulloch therefore asserts that the fact that Mr. Tucker intentionally withheld the fact that Ms. Stewart had informed him of her opinion that the shooting was accidental constitutes a blatant effort to conceal exculpatory material which directly contradicted the State's case. Mr. Tucker learned prior to trial that Ms. Stewart possessed exculpatory material. Mr. Tucker also knew that the duty to reveal exculpatory material persisted throughout the trial of this case. Nevertheless he did not inform defense counsel, and he thereafter did not call Ms. Stewart to the stand to testify. These acts are the prosecutorial misconduct of which McCulloch based his writ.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE'S ACTION IN VIOLATING THE TRIAL COURTS OMNIBUS DISCOVERY ORDER BY CONCEALING AN EXCULPATORY STATEMENT MADE BY A WITNESS TO THE SHOOTING CONSTITUTED PROSECUTORIAL MISCONDUCT WHICH WOULD INVOKE THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THUS BARRING PETITIONER'S RETRIAL.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution[1] protects a defendant in a criminal proceeding against multiple punishment or repeated prosecutions for the same offense. In United States v.

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[1] Made applicable to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969).

Dinitz, 424 U.S. 600 (1976), the Supreme Court recognized that ordinarily where a defendant requests a mistrial or exercises his right to appeal, the Double Jeopardy Clause would not stand in the way of re-prosecution.

Courts have long recognized an exception to the above-stated principle. In Oregon v. Kennedy, 456 U.S. 667 (1982), the Supreme Court recognized the principal that prosecutorial overreaching could invoke the protection of the Fifth Amendment Double Jeopardy Clause. However, the Court ruled that:

> Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

In a concurring opinion in Oregon v. Kennedy, Justice Powell stated the following:

> I join the Court's opinion holding that the intention of a prosecutor determines whether his conduct, viewed by the defendant as justifying a mistrial, bars a retrial of the defendant under the Double Jeopardy Clause. Because "subjective" intent often may be unknowable, I emphasize that the court - in considering a double jeopardy motion- should rely primarily upon the objective facts and circumstances of the particular case.

The objective definition of "prosecutorial overreaching" most relied upon is the definition as set out in the Fifth Circuit's decision in United States v. Kessler, 530

F.2d 1246 (5th Cir. 1976), wherein the court surveyed then existing Supreme Court decisions and stated that in order to invoke the protection of the Double Jeopardy Clause of the Fifth Amendment, a reviewing Court must perform a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial (or basis of appeal) to determine if there was "prosecutorial over-reaching." The Court stated:

> To find "prosecutorial overreaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in conviction."

United States v. Kessler, 530 F.2d at 1256; quoting United States v. Dinitz, 96 S.Ct. at 1080.[2] It must be noted,

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[2] See also United States v. Broderick, 425 F.Supp 93 (S.D. Fla. 1977); People v. Pendleton, 394 N.E.2d 496 (Ill. 1979); People v. Cavallerio, 428 N.Y.S. 585 (N.Y. 1980); Commonwealth v. Murchison, 465 N.E.2d 256 (1984); State v. Kennedy, 666 P.2d 1316 (Ore. 1983); Pool v. Superior Court, 677 P.2d 261 (Ariz. 1984). In these cases the conduct which constituted "prosecutorial overreaching" consisted of:

1). a deliberate comment on the defendant's failure to testify on his own behalf (Cavallerio);

2). a question pertaining to the trial and conviction of a codefendant after a specific instruction from the trial judge to the prosecutor to avoid the subject (Murchison);

3). violation of the State Code of ProfessionalResponsibility based upon a prosecutor's repeatedly disregarding a ruling of the trial court regarding permissible questions (Pool).

4). prosecutor deliberately elicited improper statement, even though she had been twice cautioned not to do so because of its prejudicial and hearsay nature. Further, the prosecutor had agreed not

however, that in Kessler, the court of appeals espoused a review of the prosecutor's conduct, regardless of the prosecutor's actual intent to cause a mistrial, and evaluated the result of the government's improper conduct on the ability of the defendant to receive a fair trial. In Oregon v. Kennedy, however, this Court noted that it was narrowing the test from the "generalized standard of 'bad faith conduct' or 'harassment' on the part of the judge or prosecutor", to a test simply evaluating whether the prosecutor intended to goad the defendant into moving for a mistrial. Petitioner asserts that the test espoused by the Court in Oregon v. Kennedy does not adequately protect the citizen accused, and asserts that the Court should adopt the standard evaluating the government's bad-faith conduct, and whether it unfairly deprived the Petitioner of a fair trial, as opposed to simply evaluating whether the government acted with intent to provoke Petitioner into moving for a new trial.

Petitioner likens this situation to that of the exclusionary rule of the Fourth Amendment to the United States Constitution. When an officer of the State violates the rights of the citizen accused, the remedy is exclusion of the evidence. Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160 (1987); United States v. Weeks, 232 U.S. 383, 34 S.Ct. 341 (1914).

> The [Supreme] Court has stressed that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." [citation omitted]. Application of the exclusionary rule "is neither intended nor

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to elicit the statement and the trial judge ratified the agreement (Broderick).

> able to 'cure the invasion of the defendant's rights which he has already suffered.'" [citation omitted]. Rather, the rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" [citation omitted].

Illinois v. Krull, 480 U.S. at 347, 107 S.Ct. at 1165-1166.

The remedy of the Double Jeopardy Clause of the Fifth Amendment should be used in a similar fashion to bar prosecution of cases where the prosecution has engaged in bad-faith or overreaching conduct.[3] By limiting the remedy only to those situations where the Court finds that the prosecution acted with the intent to goad the citizen accused into a mistrial, the conduct goes unpunished. To simply say, as Justice Stevens stated in Oregon v. Kennedy, 456 U.S. at 686, 102 S.Ct. at 2095, that the prosecution suffers substantial costs if the defendant consents to a mistrial, e.g. the prosecutor must go to the time, trouble, and expense of starting all over with the criminal prosecution, is a fallacy. The only person who suffers in such a situation is the citizen accused who must pay again for the retrial, both financially and emotionally. The prosecutor suffers no personal financial loss.

Other courts have embraced the view that in order to adequately protect a citizen accused against bad-faith conduct

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[3] By way of example, when a government agent has failed to include information in an affidavit requesting a search or arrest warrant which would have vitiated probable cause, the defendant's Fourth and Fourteenth Amendment rights would be violated. Bruning v. Pixler, 949 F.2d 352, 357 (10th Cir. 1991).

of the prosecution, the double jeopardy bar must be interposed. In People v. Pendleton, 394 N.E.2d 496 (Ill. 1979), the court found a violation of the Double Jeopardy Clause of the Fifth Amendment based upon an assistant state's attorney holding a conference during a weekend recess while the complainant was still subject to cross examination and the complainant had not yet identified any of the defendants at trial as her assailants. When the trial commenced after the recess, the witness positively identified each of the defendants on trial. When questioned by the court, the state's attorney attempted to conceal the meeting and its purpose. The court held:

> We find that based upon the facts of this particular case, the assistant state's attorney's misconduct in holding the conference, coupled with her tacit attempt to conceal it and the possibility that prejudicial harm may have resulted therefrom, warrants a finding of overreaching. It would be offensive to the constitutional guaranty against successive, oppressive prosecutions, if the State, at a trial in which its case was going badly could, by such misconduct, precipitate a mistrial and thereby gain another more favorable opportunity to convict the accused.

In a similar case, Lovinger v. Circuit Court of the 19th Judicial Cir., 845 F.2d 739 (7th Cir. 1988), the 7th Circuit affirmed an order barring a retrial based in part on the prosecutor's conversations with a witness and his repeated representations concerning the contents of those conversations. Petitioner asserts that these courts have followed the standard which best protects against unfair prosecutorial conduct. As the Supreme Court stated in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633

(1935), because of the prosecutor's position, the prosecution is held to a higher standard of conduct:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

A double jeopardy bar to retrial based upon prosecutorial misconduct **should** focus on the prosecutor's intent to do an act and the results of the act, not his intent to cause a result. It should be a conduct-oriented test, not a result-oriented test.

The Supreme Court has specifically ruled that suppression of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 104, 83 S.Ct. 1194, 1196-1197 (1963). However, it seems more than a little confusing to say that police conduct in illegally obtaining evidence should be punished by the

exclusionary rule, but a direct violation by a prosecutor of the constitutional mandates outlined in Brady goes unpunished unless it is determined that the prosecutor acted with specific intent to goad the defendant into a mistrial. Direct violations of constitutional proportions should not be accepted in this manner, for it has no deterrent effect whatsoever on a prosecutor. Such ratification of the prosecutor's actions does nothing to deter future violations; for, if the prosecutor is successful in suppressing the exculpatory evidence, and obtains a conviction, no deterrent effect occurs. However, if the prosecutor is caught, he simply has to retry the case, and again no deterrent effect occurs.

In the instant case, Mr. Tucker was made aware prior to trial that one of the eyewitnesses to the shooting was possessed of exculpatory knowledge which directly contradicted the State's theory of the case, and which comported with what the prosecutor knew was the defensive theory in the case. In refusing to inform defense counsel of the exculpatory evidence, Mr. Tucker directly violated the Trial Court's Omnibus Order, and his actions thereby directly infringed upon McCulloch's right to a fair trial. Mr. Tucker acted with complete indifference to the fact that his actions denied McCulloch a fair trial, and with complete indifference to the fact that the only way McCulloch could hope to alleviate the effects of Mr. Tucker's prejudicial behavior was to seek a new trial.

The mere fact that Mr. Tucker voiced his subjective opinion that he did not intend to deny Petitioner a fair trial or goad him into asking for a new trial is not controlling. (R I 26). Petitioner asserts that it is the prosecutor's bad-faith conduct which should be examined in this case, not simply whether the prosecutor intended to goad Petitioner into asking for a new trial. Petitioner asserts that by his actions, Mr. Tucker, intended to prejudice McCulloch's right to a

fair trial.[4] McCulloch is not the one who should be penalized for Mr. Tuckers's actions in this case. The prosecution has the burden to conduct fair trials. The State cannot suppress exculpatory evidence and expect a fair trial to result. The Double Jeopardy Clause presents a barrier in a situation like this to bar the retrial of the Petitioner when the State engaged in such prejudicial conduct as Mr. Tucker did in this case. As a result, the writ of habeas corpus should have been granted and indictment in this case dismissed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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[4] See United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547 n.12, 557 (1971), wherein the Court stated the following: "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. United States v. Tateo, 337 U.S. 463, 468 n.3, 84 S.Ct. 1587, 1590 (1964).

APPENDIX A

COURT OF APPEALS
TWELFTH COURT OF APPEALS
DISTRICT OF TEXAS
JUDGMENT

JANUARY 31, 1995

NO. 12-94-00128-CR

TIMOTHY NELSON MCCULLOCH,
Appellant
V.
THE STATE OF TEXAS.
Appellee

Appeal from the Second Judicial District Court
of Cherokee County, Texas. (Tr.Ct.No. 12269-B)

THIS CAUSE came on to be heard on the transcript of the record; and the same being inspected, it is the opinion of this Court that there was no reversible error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all thing affirmed and that this decision be certified to the court below for observance.

Tom B. Ramey, Jr., Chief Justice.

NO. 12-94-00128-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

TIMOTHY NELSON MCCULLOCH, APPELLANT	§	APPEAL FROM THE SECOND
V.	§	JUDICIAL DISTRICT COURT OF
THE STATE OF TEXAS, APPELLEE	§	CHEROKEE COUNTY, TEXAS

Appellant, Timothy Nelson McCulloch ("McCulloch"), asserts that the trial court erred in denying his pretrial application for writ of habeas corpus on the ground that double jeopardy bars his further prosecution for the murder of Michael Roy Hampton ("Hampton"). We disagree and affirm the trial court's order.

McCulloch was convicted in the 349th Judicial District Court of Houston County for the murder of Hampton and his punishment assessed by the jury at fifty years imprisonment. Subsequently, McCulloch filed a motion for new trial complaining, among other grounds, that the State had failed to disclose to him exculpatory evidence it had received from Melissa Stewart ("Stewart"), a witness to the

shooting, in violation of the trial court's omnibus pre-trial order. The trial court granted McCulloch's motion for new trial on this ground, which order was affirmed by this court. Thereafter, on August 12, 1993, the case was transferred by change of venue order to the Second Judicial District Court in adjoining Cherokee County.

On October 1, 1993, McCulloch filed his application for writ of habeas corpus complaining that double jeopardy barred his retrial. In the application, McCulloch assigned two federal and two state constitutional grounds for his prior jeopardy claim which are the same grounds as his four points of error here. A hearing was conducted by the trial court on May 10, 1994, and the court denied the writ of habeas corpus that day. On June 1, 1994, Findings of Fact and Conclusions of Law were filed.

The asserted basis of McCulloch's claim for habeas relief is Special Prosecutor B.N. Tucker, Jr.'s ("Tucker") failure to disclose to him or his counsel that the witness Stewart had told Tucker in a conversation during an early stage of the murder trial that she thought that the shooting was accidental and that McCulloch had made declarations to that effect immediately after the gun discharged. Although subpoenaed by the State and in attendance during McCulloch's murder trial, Stewart was not called by either side to testify. Furthermore, McCulloch asserts that Tucker had earlier called Stewart to appear before the Grand Jury but she was only interrogated about the events that preceded the shooting, not the shooting itself or any subsequent statements or events.

Tucker responded that although he recalled a conversation with Stewart during the early stages of the trial in which she advised that she thought the shooting was accidental, he did not believe that the remark was

exculpatory; he was aware that she had been under psychiatric care, and that this remark was not consistent with her own written statement[1] to the State or with the State's investigator's report of the incident. Tucker further acknowledge that if he had considered Stewart's statement exculpatory, the failure to disclose it would have been violative of the court's omnibus pre-trial order. Stewart and McCulloch were "good friends", and there was no evidence that McCulloch was not aware that she was present at the time of the shooting. Tucker denied that he undertook to prevent Defendant from contacting Stewart at any time nor suggested to Stewart that she not talk with him or his counsel.[2] Tucker furthermore denied that he intended to prejudice McCulloch's right to a fair trial by not disclosing the claimed exculpatory remarks to him.

After the habeas corpus hearing, the trial court recited his fact findings and concluded that Tucker "did not intend to cause a mistrial or seek to obtain a conviction based upon unfair prejudice" to McCulloch's rights. The application for writ of habeas corpus was denied by the trial court on all constitutional grounds.

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[1] Stewart testified that her written statement to the State was itself inaccurate, because it contained narrative material that the sheriff, who was one of the interrogators, insisted that she include. There is no evidence that Tucker had knowledge of any inaccuracy in Stewart's written statement nor that Stewart claimed that there had been overreaching in the drafting of the statement. No contention relating to improprieties or inaccuracies in Stewart's written statement are asserted as grounds for habeas corpus relief herein.

[2] McCulloch's counsel asserted that Stewart's parents would not permit their daughter to talk to McCulloch or his representative prior to trial. There is no evidence that Tucker was apprised of the witness's parents' prohibition.

Our standard of review is that the trial court's determination may be disturbed only if it is "clearly erroneous". *Ex Parte May*, 852 S.W.2d 3,5 (Tex. App. - Dallas 1993, writ ref'd). This standard accords great deference to the trial court's findings and conclusions. *Ibid.* The evidence is viewed in the light most favorable to the court's ruling. *Ibid.*

We consider first the federal Double Jeopardy Clause of the Fifth Amendment as made applicable to the states through the "Due Process Clause" of the Fourteenth Amendment to the United States Constitution. In 1982, the United States Supreme Court held that the misconduct that would bar retrial arises only if the prosecutor *intended* to subvert the protections afforded by the Double Jeopardy Clause. *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982). This standard calls for the trial court to make findings of fact as to the prosecutor's subjective intentions; "the familiar process in our criminal justice system" of weighing the *objective* facts and circumstances surrounding the misconduct is the means by which the trier of fact determines the prosecutor's intent. *Ibid*, 102 S.Ct. at 2089.

Kennedy further stands for the proposition that when a criminal defendant elects to file a motion to terminate his trial and is successful, the prosecution is not barred from retrying him. *Ibid.* But because a defendant has a valuable right in having his trial completed before the first jury empaneled to try him, if the motion for mistrial results from the State's intention to "goad" him into the mistrial, a narrow exception is recognized prohibiting multiple prosecution. *Ibid.* Here, the State did not at any time seek to terminate McCulloch's murder trial nor to provoke him into moving for a mistrial. The complained-of conduct was not an affirmative act by the prosecutor that precipitated a motion

for mistrial, but rather was a failure to act or perform a duty of disclosure. A similar occurrence was presented in *Zimmerman v. State*, 750 S.W.2d 195 (Tex. Cr. App. 1988) where the Defendant asserted "prosecutorial overreaching" in using his extrajudicial confession when the State knew that the statement had been obtained by police brutality, although no motion for mistrial was urged; after an analysis of "the facts and circumstances presented", the court held that a retrial was not precluded absent facts and circumstances that demonstrated that the charged overreaching demonstrated an intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. *Zimmerman*, 750 S.W.2d at 210, 211; *Kennedy*, 102 S.Ct. at 2089.

The undisputed evidence established that Tucker did not secrete Stewart from McCulloch or his counsel. Tucker did not forbid Stewart from discussing her recollection of the occurrence with Appellant. On the contrary, during the course of the trial, the State subpoenaed Stewart to be in attendance at the courthouse rather than render her unavailable to McCulloch. Although Tucker did fail to advise McCulloch of his conversation with Stewart, for which a new trial has been ordered, and is now pending in another county, the objective facts and circumstances are supportive of the trial court's conclusions that the prosecutor did not intend to provoke a mistrial or obtain a conviction based upon unfair prejudice to McCulloch's rights. We hold that the trial court's conclusions as to the prosecutor's intent were not clearly erroneous, and McCulloch is not entitled to relief under the federal Double Jeopardy Clause or the Due Process Clause of the United States Constitution. McCulloch's first and third points of error are overruled.

In his second and fourth points, McCulloch asserts that Article I, Section 14 of the Texas Constitution, the Double Jeopardy Cause of the state Bill of Rights, as well as

Article I, Sections 13 and 19, Texas' Due Course of Law constitutional provisions, should be accorded a more generous interpretation than the federal rule as expressed in *Kennedy*. Specifically, McCulloch urges that we construe Section 14 to focus the inquiry upon the prosecutor's intent to do an act, rather than upon his intent to cause a specific result, *i.e.*, a mistrial or appeal, as proscribed by *Kennedy*.

No Texas authority is cited for this contention. McCulloch argues that there is precedent for broader state than federal protections in other Texas Bills of Right sections. *Heitman v. State*, 815 S.W.2d 681 (Tex. Cr. App. 1991); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). He furthermore suggests that the courts of the states of Pennsylvania and Arizona have interpreted their Double Jeopardy provisions in a more liberal manner which Texas should now adopt. The *Kennedy* rule, however, has been approved and adopted by numerous Texas appellate courts. *Collins v. State*, 640 S.W.2d 288, 290 (Tex. Cr. App. 1988); *Creekmore v. State*, 860 S.W.2d 880, 891 (Tex. App. - San Antonio 1993, pet. ref'd); *Ex parte May*,852 S.W.2d 3,5 (Tex. App. - Dallas 1993, pet. ref'd); *Black v. State* 845 S.W.2d 368, 369 (Tex. App.-Houston [1st Dist.] 1992, no pet.); *Demouchete v. State*, 734 S.W.2d 144, 146 (Tex. App. - Houston [1st Dist.] 1987, no pet.); and others. From the facts and circumstances of this case, we do not discern a compelling necessity to expand the accepted Texas interpretation of the double jeopardy standard. McCulloch's second and fourth points of error pertaining to claimed violations of the Double Jeopardy and Due Course of Law provisions in the Texas Constitution are overruled.

The Order of the trial court denying McCulloch's application for writ of habeas corpus is **affirmed**.

TOM B. RAMEY,JR.

Chief Justice

Opinion delivered January 31, 1995.

PUBLISHED

APPENDIX B

CAUSE NO. 12269-A

EX PARTE	§ IN THE DISTRICT
	§ COURT OF CHEROKEE
V,	§ COUNTY, TEXAS
	§ 369TH JUDICIAL
TIMOTHY NELSON MCCULLOCH	§ DISTRICT

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Having considered the pleadings filed in the instant case, including the applicant's petition for writ of habeas corpus, the official court records in the above-captioned cause, the testimony from the evidentiary hearing conducted on May 10, 1994 and the argument of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACTS

1. The applicant, Timothy Nelson McCulloch, was charged with, indicted for, and convicted of the offense of murder in Cause No. 13,796, in the 349th District Court of Houston County, Texas. The jury then sentenced the applicant to fifty years imprisonment and an affirmative finding of a deadly weapon was entered.

2. The applicant filed a motion for new trial in which he asserted, among other grounds, that the State had failed to disclose exculpatory evidence pursuant to the trial court's order.

3. On September 16, 1991, the trial court granted the applicant's Motion for New Trial, and the State appealed this order.

4. The Court of Appeals for the Twelfth Court of Appeals District affirmed the trial court's trial order granting a new trial, holding that the trial judge did not abuse his discretion in ordering a new trial.

5. The trial court based his ruling on the fact that: "The State, in violation of the Court's order to produce any evidence which tended to be exculpatory, being the uncontradicted evidence presented by Melissa Stewart this date, that she divulged certain evidence to the State that the shooting was 'accidental,' rather than murder ... the prosecutor having failed to relay that information to the defendant, as ordered by the Court."

6. The State appealed the case claiming that the evidence offered by Melissa Stewart at the motion for new trial was not credible and was not exculpatory. The trial judge and the Twelfth Court of Appeals disagreed with the State and the judge's order granting a new trial was affirmed by the Court of Appeals. The case was remanded for a new trial.

7. On August 12, 1993, the case was transferred to this Court on a change of venue motion and was assigned the above cause number.

8. The applicant filed a pretrial Application for Writ of Habeas Corpus, alleging that: 1) the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution as applied to the states by the Due Process Clause of the Fourteenth Amendment prohibits the applicant's retrial; 2) the Double Jeopardy bar of the Texas Constitution, Art. I, § 14, prohibits the applicant's retrial; 3) the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the applicant's retrial

because the State engaged in prosecutorial misconduct during his first trial; and 4) the due course of law provisions of the Texas Constitution, Art. I, §§ 13 & 19 prohibits the applicant's retrial because the State engaged in prosecutorial misconduct.

9. The Court held an evidentiary hearing on May 10, 1994. The only witness was Mr. Tuck Tucker, the chief prosecutor for the State at the original cause.

10. Mr. Tucker testified that he had subpoenaed Melissa Stewart to trial as a possible witness and that he had never prevented her from talking with the applicant's attorney, nor told her not to talk with the applicant's counsel. Mr. Tucker testified that he does not recall Ms. Stewart telling him that the applicant told her, immediately after the shooting, that this shooting was an accident. Mr. Tucker further testified that he does not believe that Ms. Stewart did tell him that the applicant told her the shooting was an accident. Mr. Tucker also stated that he did not believe that if Ms. Stewart had told him that the applicant had said that the shooting was an accident that this would be Brady material because it was evidence that the applicant already knew about since he was the person who said the words. Mr. Tucker testified that he did not intend to prejudice the applicant's right to a fair trial by his conduct.

CONCLUSIONS OF LAW

1. Because the prosecutor did not intend to cause a mistrial or seek to obtain a conviction based upon unfair prejudice to the applicant's rights, the applicant's claim that his is entitled to relief under the Double Jeopardy Clause or the Due Process Clause of the United States Constitution fails. *Oregon v. Kennedy*, 456 U.S. 667 (1982).

2. Because the prosecutor did not intend to cause a mistrial or seek to obtain a conviction based upon unfair prejudice to the applicant's rights, the applicant's claim that he is entitled to relief under the Double Jeopardy or Due Course of Law provisions of the Texas Constitution fails. *Zimmerman v. State*, 750 S.W.2d 194 (Tex. Crim. App. 1988); *Chvojka v. State*, 582 S.W.2d 828, 830-31 (Tex. Crim. App. 1979) (panel op.); *Ex Parte Shutter*, 868 S.W.2d 383, 385-86 (Tex. App. -- Houston [1st Dist.] 1993, no pet. reported).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court concluded that the applicant is not entitled to habeas corpus relief. Signed this 1 day of June, 1994.

/s/ B. W. Bentley, III
B.W. Bentley, III
Presiding Judge
369th District Court
Cherokee County, Texas